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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FLORENCE MINING COMPANY, CONTESTANT	CONTEST PROCEEDING
	Docket No. PENN 86-297-R
v.	Order No. 2697882; 8/14/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Florence No. 2 Mine

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION,
PETITIONER v. FLORENCE MINING COMPANY, RESPONDENT
CIVIL PENALTY PROCEEDING
Docket No. PENN 87-16
A.C. No. 36-02448-03575
Florence No. 2 Mine

DECISION

Appearances: Covette Rooney, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor; R. Henry Moore, Esq., Florence Mining Company, Pittsburgh, Pennsylvania, for Florence Mining Company.

Before: Judge Fauver

These consolidated proceedings were brought under the Federal Mine Safety and Health act of 1977, 30 U.S.C. 801, et seq. The company seeks to vacate a withdrawal order charging a violation of a safety standard, and the Secretary seeks to uphold the order and to have a civil penalty assessed for the violation charged.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACTS

1. Respondent operates an underground coal mine, known as Florence No. 2 Mine, which produces coal for sale or use in or affecting interstate commerce.

2. On August 14, 1986, Inspector Ronald Gossard issued an order pursuant to 104(d)(2) of the Act alleging a violation of 30 C.F.R. 75.1704 for an incident on August 13, 1986, involving the replacement of the hoist rope at the Florence No. 2 Mine. The order reads as follows:

> The slope hoist facility approved by MSHA to transport injured miners from the mine was removed from operation to replace the hoist cable while miners were underground. The hoist was not available for use from 9:30 a.m. to 3:00 p.m. on August 13, 1986. The operator's approved plan requires a person trained to operate the hoist shall be available when miners are underground to transport injured persons to the surface. This requirement implies that the hoist will also be available for use when miners are underground. The order is a result of a 103(g)(1) request from a representative of the miners dated August 14, 1986.

3. The underground workings of the mine may be reached by a slope from the surface. It is a "dual compartment" slope with a track entry in one compartment and a belt entry in the other. The slope is about 620 feet long, 16 feet wide and 6 feet high. In the first 200 feet of descent the grade is about 16 degrees. This is the steepest part of the slope, and after this section the grade lessens to 5 degrees. There is track in the slope used by the materials hoist that lowers supplies and equipment into the mine. A walkway runs down the slope on the left side of the entry. Along the entire length of the slope walkway a handrail and lighting are provided. With the exception of about 100 feet where ties are placed across the walkway to prevent damage to the hoist rope around a curve, the walkway is concrete and relatively smooth. The part crossed by ties (100 feet) is uneven and would require careful stepping to carry a stretcher up the slope.

4. The walkway is used by all miners entering and exiting the mine on three shifts. The miners walk down the slope and use transportation at the bottom to travel farther into the mine. At the end of the shift, miners walk up the slope. Descent by walking usually takes two to three minutes. It takes longer to ascend the slope.

5. Early in August, 1986, the company decided to replace the hoist rope because of damage to the rope. While the hoist rope did not yet meet the criteria for mandatory retirement of the rope, it was felt that it should be changed. Management decided that this would be done on August 13, 1986, a production day, so that the hoist could be used the next weekend to lower a new continuous miner into the mine. There was no safety reason requiring that the hoist rope be changed on a production day, and it would have been feasible to change the rope on a Saturday or Sunday when miners would not be underground.

6. Some of the work of replacing the rope began on August 12, when one end of the new rope was unspooled and taken into the hoist house. The new rope was stretched from the hoist house to the top of the slope where it lay until work began the next day to replace the old rope.

7. Sometime after 9:30 a.m. on August 13, when the day shift miners were working underground, the old rope was taken off the hoist, and it was removed from service. Replacement of the rope took until about 3:30 or 4:00 p.m.

8. After the new rope was installed, there were some

problems with twists that were observed in the rope. The midnight shift did not go into the mine until 5:00 a.m. on August 14, while management sought to correct the condition.

9. A union complaint was made to MSHA pursuant to 103(g) of the Act concerning the twists in the rope. Inspector Gossard went to the mine about 9:00 a.m. on August 14, in response to this complaint.

10. Inspector Gossard inspected the hoist rope to determine if the twists in the rope had caused any damage. After he determined that no damage had occurred and that no violation existed, he was given a second 103(g) complaint concerning the replacement of the rope while miners were underground. He investigated this complaint and found that the hoist rope had been changed the previous day while miners were underground. There was no dispute about this incident occurring, and management acknowledged that the hoist had been taken out of service to change the hoist rope, from

about 9:30 a.m. to 3:00 p.m., on August 13. Based upon his investigation, Inspector Gossard issued 104(d)(2) order charging a violation of 30 C.F.R. 75.1704. The order was issued August 14, 1986.

DISCUSSION WITH FURTHER FINDINGS

The Secretary's Authority Under 104(d)

104(d) of the Act provides:

> (d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized represenative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar

> violations, the provisions of paragraph (1) shall again be applicable to that mine.

Respondent argues that the issuance of a 104(d)(2) order charging an unwarrantable failure violation is improper when it results from an "investigation" rather than an "inspection." A number of decisions or orders of Commission judges have so held. Four of those cases are pending on review before the Commission.

This line of cases began with Judge Steffey's decision in Westmoreland Coal Company v. Secretary, Docket No. WEVA 82Ä340ÄR, Order Granting in Part Motion for Summary Decision (May 4, 1983). The other decisions follow the reasoning of the Westmoreland decision.

Westmoreland involved thirteen 104(d)(2) orders issued July 15, 1982, based on an investigation conducted in December 1980, which followed a mine explosion which occurred November 7, 1980. Judge Steffey concluded from his study of the legislative history of the 1969 Act that an inspection was thought to be capable of being conducted in a single day, and an investigation could take weeks or months. He thought it significant that the 1977 Act permitted a citation or an imminent danger closure order to be issued "upon inspection or investigation," whereas the 1969 Act requirement that unwarrantable failure orders be issued "upon any inspection" was continued in the 1977 Act. Judge Steffey concluded that "Congress did not intend for unwarrantable failure provisions of 104(d) to be based on lengthy investigations" or upon "a belief" that a violation occurred. The orders before him were based not "upon an inspection but upon sworn statements taken during an accident investigation made 19 months prior to the time the orders were issued." Judge Steffey's order vacating the withdrawal orders was based on the facts that they resulted from subsequent investigations and not from an inspection and that they were not issued "promptly" as required by 104(d)(2).

The "unwarrantable failure" designation was first enacted in the Federal Coal Mine Safety Act Amendments of 1965, Pub.L. 89Ä376. Called the "reinspection closing order," the new provision was added "to stem certain recurrent violations of safety standards in underground coal mines." S.Rep. No. 89Ä1055, 89th Cong.2d Sess., reprinted in 1966 U.S.Code Cong.Ad. News 2072, 2075. Attempts to limit the scope and applicability of the new provision were flatly rejected. Id. at 2077Ä2079. In including the provision in the 1977 Act, Congress again stated that the "unwarrantable failure" section should be broadly construed.

Noting that the Interior Board of Mine Operations Appeals in some early 1969 Act cases had taken "an unneccessarily and improperly strict view of the "gravity test' contained in the provision [Eastern Associated Coal Corp. 3 IBMA 331 (1974)]," the Senate Report stated its approval of the Board's less restrictive reinterpretation in Alabama ByÄProducts Corp., 7 IBMA 85 (1976). S.Rep. 95Ä181, 95th Cong., 1st Sess. 31Ä32 (1977). Similarly, the Senate Report rejected the Board's initial interpretation of the term "unwarrantable failure to comply" as too narrow, and fully embraced the liberalized definition set forth in Zeigler Coal Company, 7 IBMA 280 (1977) (discussed further below), which stated that "the inspector's judgment must be based upon a thorough investigation . . . " (at 296).

The legislative history of the 1977 Act shows that Congress did not intend to change the unwarrantable failure provisons of the 1969 Act. The language of 104(d) was carried over intact, and after referring to the above liberalized reinterpretations by the Interior Board of Mine Operations Appeals, the Senate Committee Report stated: "These decisions considerably restored the unwarrantable failure closure order as an effective and viable enforcement sanction in essentially the same form. . . . " S.Rep. No. 95Ä181, 95th Cong., 1st Sess., 32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong.2d Sess., Legislative History of the Federal Mine Safety and Health of 1977, at 620 (1978).

The 1969 Act used only the term "inspection" in 104, which provided for issuance of notices of violation (citations under the 1977 Act) and closure orders for imminent danger and unwarrantable failure to comply. However, the case law under the 1969 Act shows that notices and orders could be issued without the inspector actually observing the cited condition or conduct. Sewel Coal Company 2 IBMA 80 (1975); Rushton Mining Company, 6 IBMA 329 (1976); Peabody Coal Company, 1 FMSHRC 1785 (1979).

The 1977 Act uses the term "inspection or investigation" in referring to citations (104(a)) and imminent danger withdrawal orders (107(a)). It uses only the term "inspection" in referring to 104(b) closure orders for failure to abate a citation, and in referring to 104(d) citations and orders.

Even though only the term "inspection" is used in 104(d), the "findings" required, i.e., an unwarrantable failure and a significant and substantial violation, clearly require a thorough investigation of the circumstances of the

violation, the background facts, the actual or constructive knowledge of the mine operator, etc. Thus, the word "inspection" is not per se a limitation on the inspector's role and authority in 104(d). Similarly, 103(g)(1) of the Act uses only the term "inspection" concerning the right of a representative of miners (or a miner if there is not a representative) to require MSHA to come to the mine in response to a complaint of a violation of the Act or of an imminent danger. Clearly, if the operator corrects the condition before the inspector arrives MSHA may still proceed with an investigation of the 103(g) complaint despite the use of the term "inspection." Otherwise, the miners' important right to complain to MSHA could be frustrated by on-off compliance depending on the presence of an inspector. Also, there are many kinds of violations that can be established by undisputed evidence, e.g., mine records or statements of mine management, even though the violation may have ceased before the inspector arrives. To say that this type of evidence cannot substantiate a 104(d) citation or order unless the violation is still i progress when the inspector arrives is to pursue a narrow, restrictive interpretation of the statute. Congress, however, intended a liberal construction of the Act to effectuate its purposes. The focus of 104(d) is the operator's failure to abide by a safety and health requirement, not the inspector's discovery of the violation in progress.

For all these considerations, I must disagree with those of my colleagues who have held that an "inspection" as used in 104(d) limits the inspector's authority to apply that section only to violations he observes in progress. I hold that 104(d) citations and orders may be issued for violations that are reasonably recent, consistent with the prompt disposition intended by 104(d), even though the violation ceased before the inspector's arrival on the scene. Relevant factors in determining the reasonableness of the inspector's use of 104(d) authority may include the recency of the violation, the quality of the information relied upon, the time spent in the investigation, the extent to which controlling facts are undisputed, e.g., facts that are evident from mine records, statements of mine management, or undisputed statements of eye witnesses.

In the instant case, the violation was quite recent, only the day before the inspector arrived, and it was quickly established by acknowledged, undisputed facts. These facts showed that the hoist had been deliberately shut down from about 9:30 a.m. to 3:00 p.m., on August 13, 1986. The inspector also found that the approved escape facilities plan required that a person trained to operate the hoist shall be

available when miners are underground to transport injured persons to the surface. He reasonably concluded that this provision of the approved plan meant that mine management was required to keep the hoist in service while miners were underground.

Title 30, C.F.R. 75.1404 Escapeways provides in pertinent part:

> Except as provided in 75.1705 and 75.1706 at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways . . . shall be maintained in safe condition and properly marked. . . . Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be at or in each escape shaft or slope to allow persons to escape quickly to the surface in the event of an emergency. [Emphasis added.]

There is no provision or exception allowing the operator to close or remove the approved escape facilities for 5 1/2 hours while miners are underground. It was therefore a violation of this section to shut down the hoist while miners were underground.

Was the Violation "Unwarrantable"?

The Senate Report on the 1977 legislation rejected the Interior Board of Mine Operations Appeals' initial interpretation of the phrase "unwarrantable failure to comply" in Eastern Associated Coal Corporatin, 3 IBMA 1331, 356 (1974), as too narrow, and fully embraced the more liberal definition set forth in Zeigler Coal Company, 7 IBMA 280 (1977), as follows (quoted in the Senate Report from the decision's syllabus): The phrase unwarrantable failure to comply means "the failure of an operator to abate a condition or practice constituting a violation of a mandatory standard it knew or should have known existed, or the failure to abate such a condition or practice because of indifference or lack of reasonable care." S.Rep. 181, 95th Cong., 1st Sess. 31Ä32 (1977), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619Ä620 (1978).

The Zeigler case was on remand from the United States Court of Appeals for the District of Columbia Circuit, which had reversed the Interior Board and indicated a strong rejection of the Board's interpretative approach in Eastern Associated Coal Corporation.

On remand, in describing its earlier interpretation of 104(d), the Board stated: "In Eastern Associated Coal Corp., supra, 3 IBMA at 356, we gave the legislative history only passing reference, preferring instead to place our own gloss upon the statutory language ["unwarrantable failure to comply']." 7 IBMA at 288. The earlier "gloss" was actually agency rejection of a clear Congressional intent. The Board described this prior interpretation as follows (7 IBMA at 286):

> In past cases, we have taken the position that an inspector's finding of an unwarrantable failure to comply should be sustained where MESA establishes by a preponderance of the evidence that the violation in question was the product of intentional or knowing failure to comply or a reckless disregard for the health and safety of the miners. We rejected the theory that the term "unwarrantable failure to comply" is synonymous with ordinary negligence in the occurrence of a violation. Eastern Associated Coal Corp., 3 IBMA 331, 356, 81 I.D. 567, 1974Ä1975 OSHD par. 18,706, aff'd on reconsideration, 3 IBMA 383 (1974); Freeman Coal Mining Company, 3 IBMA 434, 81 I.D. 723, 1974Ä1975 OSHD par. 19,177 (1974).

In remanding the first Zeigler decision, the Court of Appeals cautioned the Board to take due account of the legislative history of 104(d) (see 7 IBMA at 287). On remand the Board quoted and followed the legislative history, overruled its Eastern Associated Coal decision, and reinterpreted the meaning of "unwarrantable failure to comply" based on the Congressional intent, not the "gloss" the Board had previously put on it. In doing so, the Board recognized the following two pertinent pieces of the 1969 legislative history of the phrase "unwarrantable failure to comply" as used in 104(c)(1) and 104(c)(d)(2) of the 1969 Act, which are identical to 104(d)(1) and 104(d)(2) of the 1977 Act (at 7 IBMA 289):

> The primary piece of legislative history is the definition of the term "unwarrantable failure" set forth in the report of the Conference Committee, House Comm. on Ed. and Labor,

Legislative History, Federal Coal Mine Health and Safety Act, Comm.Print, 91st Congress, 2d Session (hereinafter referred to as Leg.Hist.), pp. 1108Ä1151. At page 1119, the Committee defined that term as follows:

> The term "unwarrantable failure" means the failure of an operator to abate a violation he knew or should have known existed.

A secondary source of pertinent legislative history is the Statement of the House Managers which was a report by the House conferees to the full House on the outcome of the Conference Committee's deliberations. In relevant part, the House Managers stated at Leg.Hist., p. 1030:

> %y(3)5CThe managers note that an "unwarrantable failure of the operator to comply" means the failure of the operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part.

Thus in Zeigler, based upon the definition clearly expressed in the 1969 legislative history, the Board overruled its prior board-made definition, and reached the following holding:

> [W]e hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care. The inspector's judgment in this regard must be based upon a thorough investigation and must be reasonable. [7 IBMA 295Ä296.]

In reaching this holding, the Board added: "We are well award that the terms of fault employed by the conferees and the House Managers are largely synonymous with negligence, one of the most familiar terms in American law." 7 IBMA 296, Fn. 4.

In the 1977 Act, Congress carefully chose to retain 104(d) intact, without changing a word and by adopting the clear, decisive legislative history of the phrase "unwarrantable failure to comply." I therefore hold that the phrase means the failure of an operator to abate a condition or practice constituting a violation of a mandatory standard it knew or should have known existed, or the failure to abate such a condition or practice because of indifference or lack of reasonable care.

Respondent relies upon the Commission's decision in United States Steel Corporation v. Secretary, 6 FMSHRC 1423 (1984), in contending that the Commission has changed the definition approved by Congress in the 1969 legislative history, repeated by the Interior Board in Zeigler, and again expressly approved in the 1977 legislative history of 104(d).

I do not interpret the Commission's decision as requiring a change in the legislative history definition of "unwarrantable failure to comply." In United States Steel, the Commission did not consider the 1969 legislative history (which is crucial to an understanding of the current 104(d)), and the Commission was careful to point out that the case before it did "not require [it] to examine every aspect of the Zeigler construction" (6 FMSHRC at 1437). The Commission's statement that followedÄ

> but we concur with the Board to the extent that an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable careÄ

does not purport to be a restrictive definition based upon reconsideration of the legislative history, but is merely one kind of proof of an "unwarrantable failure to comply." If the Commission's language were intended to be a new, restrictive definition, rejecting the holding in Zeigler and the unequivocal definition in both the 1969 and 1977 legislative histories, it would too closely resemble the overruled and Congressionally-repudiated Eastern Associated

Coal decision of the Interior Board to be expected to be announced by the Commission without its careful analysis and reinterpretation of the legislative history. Absent such an analysis and reinterpretation by the Commission, I do not construe the Commission's decision in United States Steel Corporation as rejecting the definition stated in Zeigler and in the 1969 and 1977 legislative histories.

Whether the clear legislative history definition or the example added by the Commission in United States Steel Corporation is applied in this case, I find that Respondent demonstrated an unwarrantable failure to comply with the cited safety standard when it deliberately shut down the hoist for 5 1/2 hours on a production day. Respondent knew or should have known that its approved escape facilities plan and 30 C.F.R. 75.1704 required that it maintain the hoist in operating condition while miners were underground, and it acted with indifference to the safety standard and with a serious lack of reasonable care when it closed the facility on a production day. It could have readily changed the hoist rope on a weekend, when miners were not underground.

Was the Violation "Significant and Substantial"?

A "significant and substantial" violation is described in 104(d)(1) of the Act as a violation of "such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." The Commission interpreted this language in Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981), as follows:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (1984), the Commission discussed the standard of proof for a significant and substantial finding, as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazardÄthat is, a measure of danger to safetyÄcontributed to by the violation; (3) a reasonable likelihood that the hazard contributed

to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The purpose of the approved escape facility, the hoist, is to provide safe and relatively fast transportation of injured persons from the mine. This facility is an important emergency protection of miners who may be injured underground. It is faster than using a stretcher to carry a miner up the steep, 620 foot slope, and it is superior to a stretcher in allowing more effective first-aid and immobilizing care. For example, a stretcher case could not be administered CPR while moving, but an injured person could receive CPR and other first aid while going up the hoist; a stretcher case would be jostled while being carried up the long, steep slope, but an injured person on the hoist would not be jostled. Because of the superiority of the hoist over using a stretcher to ascend the slope, the established practice since the hoist was approved as an escape facility was to transport injured persons out of the mine by the hoist rather than by stretcher. By shutting down the hoist for 5 1/2 hours while the day shift miners were underground, mine management consciously removed an important emergency protection of the miners. This reduction of their safety and health protection could significantly and substantially contribute to the cause and effect of aggravated injury, or even death, e.g., in case of severe shock, internal bleeding or burns. The violation was therefore significant and substantial within the meaning of 104(d).

The Amount of a Civil Penalty

Respondent is a large operator. Its annual production is about 8 1/2 million tons, and its No. 2 mine produces over 400,000 tons annually. The No. 2 mine has a history of 166 paid violations in the 24 months preceding the order issued in this case.

Considering the six criteria for civil penalties in 110(i) of the Act, I find that a civil penalty of $400 is appropriate for the violation found herein.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. Respondent violated 30 C.F.R. 75.1704 as charged in Order No. 2697882.

ORDER

WHEREFORE IT IS ORDERED that:

1. Order No. 2697882 is AFFIRMED, and the contest proceeding in PENN 86Ä297ÄR is DISMISSED.

2. Respondent shall pay the above civil penalty of $400 within 30 days of this Decision.

William Fauver
Administrative Law Judge